REPUBLIKA SLOVENIJA

USTAVNO SODIŠČE

U-I-18/93

Concurring Opinion of Judge Dr Lojze Ude, Joined by Judge Mag. Matevž Krivic

I voted for the Operative Provisions of the Decision, but I do not entirely agree with the reasoning in the Decision of the Constitutional Court, which was adopted unanimously with regard to the operative provisions. In particular, I would like to point out two definitions in the reasoning that are in my opinion theoretically questionable or that make it possible that too far-reaching conclusions can be drawn thereupon.

1. It is stated in the last sentence of Paragraph 21 of the reasoning (the reasoning under B. - II.) that at the level of constitutional law the criminal procedure is regarded as a “procedure of a substantive importance” in the decisions of constitutional courts. The substantive constitutional rights of an individual are the legislative subject of the criminal procedure.

Theoretically, it is not acceptable to use the concept of the procedure of a substantive importance. It would appear from the wording of Paragraph 21 that the procedure of a substantive importance allegedly consists of the constitutional procedural rights. It does not entail that certain procedural rights acquire the quality of substantive rights by being determined in the Constitution. Rather, they are procedural rights of such rank that they form a part of the so-called procedural public order. If these fundamental procedural rights are not regulated and guaranteed in a specific procedure, then we cannot speak of proceedings in a civilised society. However, these constitutional rights have a procedural nature. It seems that the definitions in the Decision try to give greater weight to procedural rights by including them within the concept of the "procedure of a substantive importance”. Procedural rights themselves are of such importance and in specific situations even prevail over substantive rights so that they do not need such a terminological crutch. The constitutional rights determined in

particular in Articles 22, 23, 24, and 25 of our Constitution, and with regard to the criminal procedure also in Articles 19 and 20, are of a rather distinctive procedural nature. It is, however, true that in some constitutional provisions procedural and substantive rights are intertwined.

I would not feel the need to respond to the individual terms in the reasoning if some of those terms did not entail a risk of underestimating the purely procedural rights that are actually crucial in judicial proceedings.

2. In Point 4 of the Operative Provisions, the Constitutional Court decided that the provisions of the Criminal Procedure Act governing the decision-making procedure for ordering, extending, and releasing an individual from detention are inconsistent with the Constitution. It further appears from the reasoning that according to the Constitutional Court these provisions are not consistent with the Constitution because the court may order and extend detention without giving the person concerned the possibility to be heard and to familiarise himself with the facts and evidence against him (Para. 74 of the reasoning in section B. -VI.). The state prosecutor always has the possibility to state his opinion on the matter before the court of second instance adopts its decision, however, the detainee is not informed of that opinion.

In general, I agree with such reasoning. At the same time, however, I would like to draw attention to the open issue of the adversarial nature of criminal proceedings. I do not agree with the simplified position that criminal proceedings have to be adversarial in their entirety or that it is exclusively and only adversarial criminal proceedings that satisfy the principle of the state governed by the rule of law referred to in Article 2 of the Constitution. I am not, of course, a proponent of inquisitorial criminal proceedings. But I am of the opinion that the adversarial nature of criminal proceedings still needs to be examined in detail. It has to be taken into account, namely, that criminal proceedings do not involve two parties that have, as in civil proceedings, conflicting interests, i.e. their own interests. In criminal proceedings a state (i.e. an organised society) is represented by the state prosecutor, who does not have his own personal interest in succeeding in criminal proceedings. On the opposite side is the defendant with his own personal interests; furthermore, also the injured party (either as a potential subsidiary prosecutor or as a claimant demanding damages within criminal proceedings) defends his own interests in criminal proceedings. For this reason, the issue of the adversarial nature of criminal proceedings is more complex than in the case of civil proceedings.

Of course, in criminal proceedings the question arises as to whether and to what extent this adversarial principle should be applied during the specific stages of proceedings, for example during the investigation procedure, representing the basis for issuing an indictment or for discontinuing criminal proceedings, or to what extent such adversarial principle should be applied when ordering detention. To apply the adversarial principle in its entirety also while discussing the concept of a “reasonable doubt” would give rise to the question of whether the investigation as a special part of the procedure is reasonable.

I draw attention to these issues because otherwise the requirement to give the defendant the possibility to acquaint himself with the incriminating facts also when the decision is being adopted regarding ordering, extending, or being released from detention, could also be understood in the sense that when a decision regarding detention is being adopted the defendant has to be granted the same rights as during the adversarial main hearing.

Judge Dr Lojze Ude

Joined by: Mag. Matevž Krivic